
United States District Court

SOUTHERN DISTRICT OF NEW YORK

ILYA FELIKSOVICH IOSILEVICH,

DOCKET NO.:

22-CV-04757(VB)(JCM)

Plaintiff,

-against-

**WALMART INC., JOSEPH NEGRON, KEVIN P. BRUEN, JOHN T. REICHERTER, and
WESTCHESTER COUNTY GOVERNMENT,**

Defendants.

MEMORANDUM OF LAW

BRODY, O'CONNOR & O'CONNOR, ESQS.

Attorneys for Defendant-Appellant

7 Bayview Avenue

Northport, New York 11768

(631) 261-7778

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PROCEDURAL POSTURE

Plaintiff, ILYA FELIKSOVICH IOSILEVICH (Plaintiff) commenced this action on June 7, 2022 (Doc#2).

On July 7, 2022, the FRCP 4 Service Package was hand delivered to USM for service upon, amongst others, Walmart and Negron.

On October 12, 2022, defendant, WESTCHESTER COUNTY GOVERNMENT (Westchester County), moved to dismiss (Docs#12-14) plaintiff's complaint.

On October 17, 2022, Return of Service Unexecuted as to Negron was filed (Doc#15). The docket does not contain either an unexecuted or executed return of service with respect to Walmart.

On November 18, 2022, the Court denied Westchester County's motion without prejudice and ordered plaintiff to file an Amended Complaint by December 19, 2022 (Doc#24).

Plaintiff sought an extension of time to file (Doc#25) and an extension was granted to March 1, 2023, with the caveat that no further extensions would be granted (Doc#26).

Plaintiff failed to file his Amended Complaint by March 1, 2023, and his request for another extension was denied (Doc#28).

The original complaint is deemed the operative complaint, absent the defendants dismissed from this litigation by order dated July 6, 2022 (Doc#7).

The complaint (Doc#2) alleges (1) false arrest and malicious prosecution in violation of Amendments 4th and 14th pursuant to 42 U.S.C. §1983; (2) unlawful imprisonment under NY Penal Law §135; (3) negligent infliction of emotional distress; (4) intentional infliction of emotional distress; (5) loss of time and money for defending criminal cases¹; (6) unjust enrichment; and (7) breach of contract.

¹ Presumably a claim for consequential damages that should not be asserted as a separate cause of action.

FACTS

Plaintiff alleges that he was attempting to exit the Mohegan Lake Walmart store on September 1, 2020, when a Walmart employee checked his receipt and “noticed an item was not listed” (Doc#2). He responded: “Well, then scan the item and **let me pay**” (Doc#2) (emphasis added). He was taken by Walmart employee, Negron, to a security office and refused to provide his ID to Negron or sign anything (Doc#2). Plaintiff gave Negron “a choice to either call the police and sort this out, or **let me pay**”² (Doc#2)(emphasis added).

The police were called and plaintiff was arrested for Petit Larceny in violation of Section 155.25 of New York State’s Penal Law (Doc#2, p. 27).

On March 4, 2021, the criminal complaint against plaintiff was dismissed pursuant to an Adjournment in Contemplation of Dismissal (Doc#2, p. 17). There is no allegation that plaintiff appealed.

LEGAL STANDARDS

A. Pro Se Parties

Generally, a *pro se* plaintiff is “entitled to special solicitude,” and the court must “read his pleadings ‘to raise the strongest arguments that they suggest.’” *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 387 (2d Cir. 2015) (quoting *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 477 (2d Cir. 2006) (per curiam)). However, “the appropriate degree of special solicitude is not identical with regard to all pro se litigants.” *Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010). The degree of solicitude required may be “lessened” where “the particular pro se litigant is experienced in litigation and familiar with the procedural setting presented.” *Id.*

² Plaintiff’s complaint establishes that he did, in fact, not pay for an item or items found in his possession because he stated twice: Let me pay.

Here, the plaintiff is apparently a graduate of law school, passed the New York Bar in February of 2022 (Ex. A), and advised the Court that he was taking the California Bar on February 21 and February 22, 2023 (Doc#25). Moreover, a search of PACER reveals the pro se plaintiff is a frequent litigant in federal court. It is plain therefore that this particular plaintiff is experienced in litigation and familiar with this procedural setting such that he should not be afforded any special solicitude on this motion.

The screenshot shows the PACER Case Locator interface. The search criteria are: Party Search, Last Name: Ioslevich, First Name: Ilya. The result count is 9. The table below lists the search results.

Party Name	Case Number	Case Title	Court	Date Filed	Date Closed
Ioslevich, Ilya (do)	☆ 2:2008bs-26327	Ilya Ioslevich	Florida Southern Bankruptcy Court	11/29/2001	03/13/2002
Ioslevich, Ilya Feliksovich (plai)	☆ 2:2020cv-01515	Ioslevich v. TD Bank, NA et al	New York Eastern District Court	03/23/2020	10/04/2021
Ioslevich, Ilya Feliksovich (plai)	☆ 2:2020cv-01557	Ioslevich v. Enhanced Recovery Company, LLC	New York Eastern District Court	03/26/2020	11/01/2021
Ioslevich, Ilya Feliksovich (plai)	☆ 2:2020cv-05085	Ioslevich v. Hofstra University et al	New York Eastern District Court	10/22/2020	09/29/2022
Ioslevich, Ilya Feliksovich (plai)	☆ 2:2021cv-00466	Ioslevich v. New York City Administration for Children's Services et al	New York Eastern District Court	02/01/2021	10/26/2022
Ioslevich, Ilya Feliksovich (plai)	☆ 2:2021cv-04717	Ioslevich v. City of New York et al	New York Eastern District Court	09/20/2021	08/30/2022
Ioslevich, Ilya Feliksovich (plai)	☆ 2:2022cv-01714	Ioslevich v. The City of New York et al	New York Eastern District Court	06/22/2022	
Ioslevich, Ilya Feliksovich (plai)	☆ 2:2022cv-06305	Ioslevich v. United States et al	New York Eastern District Court	10/26/2022	
Ioslevich, Ilya Feliksovich (plai)	☆ 2:2022cv-04757	Ioslevich v. Walmart Inc et al	New York Southern District Court	06/07/2022	

Below the table, there is a PACER Service Center summary for the user Ioslevich, Ilya (do) on 03/17/2023 09:36:13. It shows the client code as Walmart and the description as All Court Types Party Search. The billable pages are 1 (\$0.10). There is a 'Print Receipt' link.

On the right side, there is an 'Icon Legend' with the following items:

- Save search to Saved Searches
- Sort search results
- Choose columns to display
- Refine the current search
- Download search results
- Save case to Saved Cases
- Remove case from Saved Cases

Further, pro se status "does not exempt a party from compliance with relevant rules of procedural and substantive law." *Maisonet v. Metro. Hosp. & Health Hosp. Corp.*, 640 F. Supp. 2d 345, 348 (S.D.N.Y. 2009). A pro se plaintiff, like any other, "must state a plausible claim for relief," *Walker v. Schult*, 717 F.3d 119, 124 (2d Cir. 2013). Moreover, the court need not accept allegations that are "contradicted by other matters asserted or relied upon or incorporated by reference by a plaintiff in drafting the complaint," *Fisk v. Letterman*, 401 F. Supp. 2d 362, 368 (S.D.N.Y. 2005), and cannot "invent factual allegations that [the plaintiff] has not pled." *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010).

B. Motion to Dismiss — Rule 12(b)(5)

When a defendant moves to dismiss for insufficient service of process pursuant to Rule 12(b)(5), "the plaintiff bears the burden of establishing that service was sufficient." *Khan v. Khan*, 360 F. App'x 202, 203 (2d Cir. 2010) (summary order); *see also Cassano v. Altshuler*, 186 F. Supp. 3d 318, 320 (S.D.N.Y. 2016); *Mende v. Milestone Tech., Inc.*, 269 F. Supp. 2d 246, 251 (S.D.N.Y. 2003). "Because a Rule 12(b)(5) motion implicates 'whether [the court] has jurisdiction,' the court 'looks to matters outside the complaint.'" *Hines v. Roc-A-Fella Recs., LLC*, 2020 U.S. Dist. LEXIS 67849, 2020 WL 1888832, at *1-2 (S.D.N.Y. Apr. 16, 2020) (quoting *Cassano*, 186 F. Supp. 3d at 320). Moreover, "the adequacy of service of process must be resolved before any merits-based challenge to the complaint." *Hines*, 2020 U.S. Dist. LEXIS 67849, 2020 WL 1888832, at *2 (quoting *George v. Profl Disposables Int'l, Inc.*, 221 F. Supp. 3d 428, 442 n.7 (S.D.N.Y. 2016)) (internal quotation marks omitted); *accord Deptula v. Rosen*, 558 F. Supp. 3d 73, 2021 WL 4037709, at *7 (S.D.N.Y. Sept. 3, 2021).

C. Motion to Dismiss — Rule 12(b)(6)

Fed. R. Civ. P. 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." If a complaint fails to present "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," the deficient claims must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 65 (2d Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Presented with a Rule 12(b)(6) motion, the trial court must "accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party." *McCarthy*, 482 F.3d at 191. However, those factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Thus, "a pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (internal citations omitted) (quoting *Twombly*, 550 U.S. at 555, 557). The courts will not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678-79.

D. This Court's Special Rules for Motion to Dismiss

This Court's Individual Rules provide that upon the filing of a motion to dismiss, the Court will ordinarily issue an order requiring the non-moving party to notify the Court whether it intends to file an amended pleading. If the non-moving party elects not to file an amended pleading, the motion will proceed in the regular course, and the Court is unlikely to grant the non-moving party a further opportunity to amend to address the purported deficiencies made apparent by the fully briefed arguments in the moving party's motion (Individual Practices of Judge Vincent L. Briccetti).

Here, the pro-se plaintiff was given "a total of four months to file an amended complaint" (Doc#26) and failed to do so. He should not be given any further opportunity to amend the operative complaint to address the deficiencies contained therein (Doc#2).

ARGUMENT

I. Defendants Walmart and Negron Were Never Served and Jurisdiction Was Not Acquired Over Them

Service of process is governed by Fed. R. Civ. P. 4. Under Rule 4(a)(1), a summons must: "(A) name the court and the parties; (B) be directed to the defendant; (C) state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; (D) state the time within which the defendant must appear and defend; (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; (F) be signed by the clerk; and (G) bear the court's seal." Under Rule 4(b), "[a] summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served." *See also Trombetta v. Novocin*, 2020 U.S. Dist. LEXIS 219244, 2020 WL 7053301, at *2 (S.D.N.Y. Nov. 24, 2020) ("A separate summons must be issued for each individual defendant.").

In this case, service upon Negron was attempted, but not effected, on July 7, 2022 (Doc#15). No service was ever attempted upon Walmart and Walmart did not waive the requirement of personal service upon it by filing a Notice of Appearance. *Gore v. RBA Grp., Inc.*, 2009 U.S. Dist. LEXIS 130673 (S.D.N.Y. Mar. 10, 2009) (simply filing an appearance is insufficient to constitute waiver). Consequently, the complaint should be dismissed as against Walmart and Negron for insufficient service of process pursuant to Rule 12(b)(5).

II. A Store and Its Employees Are Not State Actors Under §1983

Section 1983 applies to the deprivation of rights under the color of law by state actors. It does not apply, except in special circumstances not presented by this case, to stores or their asset protection employees.

The Second Circuit stated in Tancredi v. Metropolitan Life Ins. Co., 316 F.3d 308, 312-13 (2d Cir. 2003), that a "plaintiff pressing a claim of violation of his constitutional rights under § 1983 is [] required to show state action," and in "order to satisfy the state action requirement where the defendant is a private entity, the allegedly unconstitutional conduct must be fairly attributable to the state" (citation and quotation marks omitted).

District courts within the Second Circuit usually reject claims that the actions of store security guards implicate state action when they detain, investigate, and swear out a complaint against suspected shoplifters. In *Josey v. Filene's Inc.*, 187 F. Supp. 2d 9 (D. Conn. 2002), a district court stated that

Generally, the acts of private security guards, hired by a store, do not constitute state action under § 1983. Courts have held that the actions of private security guards constitutes state action in two circumstances. First, private guards may be sued when they are given the authority of state law. Second, security guards are considered to be acting under state law if they are willful participants in the joint activity of the State or its agents.

Id. at 16 (citations and quotation marks omitted). In *Josey*, such circumstances were not present, and the court dismissed an alleged shoplifter's § 1983 claim. *See id.* at 17.

Several other district courts within the Circuit agree that store security guards are not state actors when they detain suspected shoplifters. *See Capogrosso v. Alan Gelbstein*, 2022 U.S. Dist LEXIS 179456 (EDNY 2022) (a private security guard providing information to police officers who then make an arrest does not constitute action under color of state law) *adopted by, summary judgment granted by* 2022 U.S. Dist LEXIS 177712, 2022 WL 4550812 (EDNY 2022) (*Moher v. Stop & Shop Cos.*, 580 F. Supp. 723, 725-26 (D. Conn. 1984) (stating in the case of an alleged shoplifter claiming a § 1983 violation that in "the absence of any hint in her complaint ... that defendant's acts were undertaken 'under color of law,' plaintiff has her remedy in a state court for

the wrong allegedly done to her"); *Newman v. Bloomingdale's*, 543 F. Supp. 1029, 1032 (S.D.N.Y. 1982) (stating that a complaint that "the police, by arresting and detaining an individual accused of shoplifting solely on the complaint of store personnel ... does not allege facts sufficient to make the store's conduct the 'state action' which is essential to state a claim under 42 U.S.C. § 1983"); *Klein v. Alexander's Dep't Store*, 1977 U.S. Dist. LEXIS 14673 at *3-4 (S.D.N.Y. Aug. 2, 1977) (stating that a guard's action "fails to supply the requisite state action ... the complaint against the store and its employees fails to state an actionable claim under section 1983"); *Estate of Iodice v. Gimbel's, Inc.*, 416 F. Supp. 1054, 1055 (E.D.N.Y. 1976) (stating that a guard's action "is not sufficient to bridge the gap between private and State action ... This 'shopkeepers' privilege' is insufficient to transform defendants' conduct into acts under color of state law").

Here, plaintiff asserts that all defendants acted "under color of law" (Doc#2, p. 13), but provides no factual allegations that would allow this Court to conclude that Negron was either given the authority of state law or was a willful participant in unconstitutional activity by the state. Since there was here no participation by Walmart and Negron in an allegedly unconstitutional activity by the state, the plaintiff's 1983 cause of action for false arrest and malicious prosecution under 42 U.S.C. §1983 must be dismissed.

III. This Court Should Not Exercise Its Supplemental Jurisdiction

Presuming that the plaintiff's §1983 claim against Walmart and Negron is dismissed pursuant to Rule 12(b)(6), it follows that this Court should not exercise its supplemental jurisdiction over the remaining state claims of unlawful imprisonment, negligent infliction of emotional distress, intentional infliction of emotional distress, breach of contract, and unjust enrichment. *Guiducci v. Kohl's Dep't Stores*, 320 F. Supp. 2d 35 (E.D.N.Y. 2004); *see also*

Biragov v. Dreamdealers USA, LLC, 2021 U.S. Dist LEXIS 220404 (SDNY 2021) (declining to exercise supplemental jurisdiction where federal claims were dismissed).

CONCLUSION

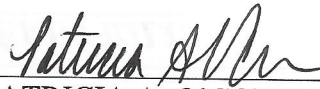
For the reasons set forth above, Walmart and Negron respectfully request that the Court dismiss plaintiff's complaint in its entirety and for such other relief as this Court may deem just and proper.

Dated: Northport, New York
March 24, 2023

Yours, etc.

BRODY, O'CONNOR & O'CONNOR, ESQS.
Attorneys for Defendants
Walmart and Negron

By:



PATRICIA A. O'CONNOR (PO 5645)
7 Bayview Avenue
Northport, New York 11768
(631) 261-7778
File No.: WM 22-505 PO

TO: Ilya Feliksovich Iosilevich
Plaintiff Pro Se
Via email and regular mail
2401 Mermaid Avenue
Brooklyn, New York 11224-2209
iiiosilevich@gmail.com

JOHN M. NONNA
Westchester County Attorney
Attorney for Westchester County
Michaelian Office Building
148 Martine Avenue, Room 600
White Plains, New York 10601
stca@westchestergov.com